

United States
Circuit Court of Appeals
For the Ninth Circuit. 6

UNITED STATES OF AMERICA,
Appellant,
vs.

MOROLOY BEARING SERVICE OF OAK-
LAND, LTD., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

FILED

MAY 23 1941

PAUL P. O'BRIEN,
CLERK

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Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY, U. S. Attorney,
ESTHER B. PHILLIPS, Assistant U. S. At-
torney,

P. O. Bldg., San Francisco, Calif.

Attorneys for Defendant and Appellant.

A. E. GRAUPNER, Esq.,

Balfour Bldg., San Francisco, Calif.,

THEODORE L. BRESLAUER, Esq.,

Humboldt Bank Bldg., San Francisco, Calif.,

Attorneys for Plaintiff and Appellee.

In the Southern Division of the District Court of
the United States for the Northern District
of California.

No. 21308W

MOROLOY BEARING SERVICE OF OAK-
LAND, LTD., a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR THE RECOVERY OF IN-
TERNAL REVENUE TAX AND INTER-
EST

Plaintiff complains of defendant and for cause
of action alleges:

I.

This is an action brought against the United States of America under Section 3226 of the revised Statutes of the United States and Paragraph twentieth of Section 24 of the Judicial Code, being Sections 1672-1673 of Title 26 and Subdivision 20 of Section 41 of Title 28, respectively, of the Code of Laws of the United States of America to recover internal revenue taxes not exceeding the sum of \$10,000.00 illegally assessed and collected from plaintiff.

II.

That at all times herein mentioned, Moroloy Bearing [1*] Service of Oakland, Ltd., was and is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Oakland, County of Alameda, State of California, Southern Division of the Northern District of California.

III.

At all times herein mentioned, defendant, United States of America, was and now is a sovereign body politic.

IV.

That plaintiff paid the sum of One Thousand Ninety-nine and 80/100 Dollars (\$1,099.80) to the Collector of Internal Revenue for the First District of California, as and for taxes claimed to be

*Page numbering appearing at foot of page of original certified Transcript of Record.

due from plaintiff under the provisions of Section 606c of the Revenue Act of 1932 upon the rebabbitting of motor bearings by plaintiff during a period extending from February, 1933, to August, 1936.

V.

That none of the articles upon which the assessment hereon was levied or the tax herein paid, were manufactured, or produced, or imported by the plaintiff herein. That plaintiff did not act as dealer or vendor of the said articles, but did repairing of the said articles by inserting babbitt alloy in the said articles.

VI.

That thereafter plaintiff filed a claim with the said Collector of Internal Revenue for the refund of said asserted taxes in the sum of \$1099.80.

VII.

That in a letter dated August 23, 1937, the Commissioner of Internal Revenue notified the plaintiff of his rejection of said claim for refund in the total amount of \$1099.80. [2]

VIII.

Plaintiff is the sole owner of claim herein sued on and no transfer or assignment of the same or any part thereof or of any interest therein has been made by plaintiff. No action on said claim other than as herein set forth has been taken in Congress or before any of the departments of the

government of the United States of America or in any Court other than the Complaint filed in this Court and there are no other charges or other off-sets to or against said claim. Plaintiff has at all times borne true allegiance to the government of the United States of America and has not in any way given encouragement to rebellion against the government of the United States of America, or at any time aided or abetted in any manner or given comfort to any sovereign or government at war with the United States of America.

IX.

That plaintiff has not included the tax or any part thereof in the price of the articles with respect to which it was imposed, or collected the amount of the tax from any vendee thereof.

Wherefore, plaintiff prays judgment against defendant in the sum of One Thousand Ninety-nine and 80/100 Dollars (\$1,099.80) with interest thereon as provided by law, and for such other relief as to this Court may seem proper.

A. E. GRAUPNER

THEODORE L. BRESLAUER

Attorneys for Plaintiff. [3]

State of California,
City and County of San Francisco—ss.

Nelson N. Scotchler, being first duly sworn, deposes and says:

That he is the President of Moroloy Bearing Service of Oakland, Ltd., a corporation, the plain-

tiff herein, and is authorized to make this verification in and on behalf of said plaintiff; that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, that he believes it to be true.

NELSON N. SCOTCHLER

Subscribed and sworn to before me this 21st day of August, 1939.

[Seal] JOHN WISNOM

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 22, 1939. Walter B. Maling, Clerk. [4]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, appearing by its attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and answers the complaint on file herein as follows:

I.

Answering Paragraph I of the complaint, denies that the taxes sought to be refunded were illegally assessed or illegally collected. Alleges that they were lawfully assessed and collected. [5]

II.

Admits Paragraphs II and III of the complaint.

III.

Answering Paragraph IV of the complaint, defendant admits that plaintiff paid to defendant's officer, the Collector of Internal Revenue for the First Collection District of California, the aggregate amount of \$1099.80 as taxes due under the provisions of Section 606-c of the Revenue Act of 1932 during the period from February 1, 1933 to and including August 31, 1936. Said taxes were reported by plaintiff in 43 monthly excise tax returns (Treasury Department Form 728) and were paid by plaintiff in the amounts shown to be due by said returns. Defendant alleges that said taxes were reported and paid upon connecting rods known and advertised by plaintiff as the "Mor-o-loy" automobile connecting rods which were manufactured and sold by plaintiff. Defendant denies that said taxes were related to the process of re-babbitting, save as said process may have been one of several processes used in the production of said rods.

IV.

Answering Paragraph V of the complaint, defendant admits that none of the articles were imported by plaintiff. Denies the remaining allegations of Paragraph V.

V.

Admits Paragraphs VI and VII of the complaint.

VI.

Defendant has no information or belief upon the allegations of Paragraph VIII and therefore denies each and every allegation therein. [6]

VII.

Defendant has no information or belief upon the truth or falsity of the allegations of Paragraph IX of the complaint, and therefore denies the allegations of Paragraph IX.

Wherefore defendant prays for judgment in its favor, for its costs and for such other relief as may be just.

FRANK J. HENNESSY,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant United States At-
torney.

Receipt of service Dec. 5th 1939.

THEODORE L. BRESLAUER
A. E. GRAUPNER
Attys. for plaintiff. [7]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Esther B. Phillips, being first duly sworn, deposes and says:

I hold the Office of Assistant United States Attorney. I make this verification in behalf of the

defendant, the United States of America, because the United States is a sovereign state. I have read the foregoing answer and know its contents. The same is true of my own knowledge, except as to matters therein alleged on information and belief, and as to those matters I believe the same to be true.

ESTHER B. PHILLIPS

Subscribed and sworn to before me this 4th day of December, 1939.

[Seal]

B. E. O'HARA

Deputy Clerk, U. S. District
Court, Northern District of
California.

[Endorsed]: Filed Dec. 5, 1939. Walter B. Mal-
ing, Clerk. [8]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Leave of Court having been first had and obtained, the defendant hereby amends the answer filed in this case as follows:

Strike out the last sentence in Paragraph III of the answer, reading:

“Defendant denies that said taxes were related to the process of re-babbitting, save as said process may have been one of several processes used in the production of said rods,” and add to said Paragraph the following:

“Defendant denies that the taxes were upon the rebabbitting of motor bearings by plaintiff. Defendant alleges that the taxes were imposed [9] upon Mor-o-loy automobile connecting rods manufactured, produced and sold by plaintiff.”

FRANK J. HENNESSY,
United States Attorney,
ESTHER B. PHILLIPS,
Assistant United States
Attorney.

[Endorsed]: Filed Dec. 29, 1939. Walter B. Mal-
ing, Clerk. [10]

[Title of District Court and Cause.]

MEMORANDUM OPINION

This is an action wherein the plaintiff seeks to recover from the defendant the sum of \$1099.80 which it paid the defendant as excise tax under Section 606c of the Revenue Act of 1932 upon the sale of rebabbitted connecting rods from 1933 to 1936.

The plaintiff now is and for a considerable time last past has been engaged in the business of rebabbitting connecting rods for the automotive trade generally in this state. When the rebabbitting of the connecting rods was finished the connecting rods were delivered to the repairing jobber who in turn sold them to the garage or automobile repair man.

Plaintiff's right to recover herein depends upon whether the process of rebabbitting the connecting

rods was one of [11] manufacture or one of repair. If the former, the tax was properly imposed. If the process was one of repair only, then the tax was not owing and plaintiff may recover.

The evidence shows the connecting rods which plaintiff rebabbitted were in their original state manufactured by others and only came into the hands of the plaintiff when certain parts of them became defective either from the burning out of the babbitt through friction while in operation, or through the lack of proper lubrication, or on account of other causes.

In no manner did the evidence show the plaintiff manufactured the connecting rods themselves, but on the contrary, the evidence clearly showed that plaintiff was engaged in the repair and rehabilitation of connecting rods manufactured by others, when they became outworn and defective from use.

In Bouvier's Law Dictionary (Rawle's Revision, Unabridged) the words manufacture and repair, when used as verbs, are defined as follows:

Manufacture—To make or fabricate raw materials by hand, art, or machinery and work into forms convenient for use.

Repair—To restore to a sound state after decay, injury, dilapidation, or partial injury.

It would be just as logical to hold that a shoe cobbler was a manufacturer of shoes that were brought to him for repair because he nailed or sewed soles and heels on the shoes in the process

of repairing them, as to hold that a mechanic was a manufacturer of connecting rods because he rebabbitted them. The process is a repair in the one case just as it is in the other. That plaintiff is repairing its own rods for sale whereas the shoe cobbler is repairing shoes of others is not significant. Whether or not a process is one of repair does not depend on the condition of the title [12] to the repaired article.

The Court orders that judgment be entered in favor of the plaintiff in the sum of \$1099.80 with interest thereon as provided by law.

Let findings of fact and conclusions of law and judgment be prepared in accordance with the opinion of the Court.

Dated: July 16, 1940.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed July 16, 1940. Walter B. Mal-
ing, Clerk. [13]

[Title of District Court and Cause.]

STIPULATION ON DATES AND AMOUNTS
OF PAYMENTS OF TAX

It is hereby stipulated and agreed that the amounts of taxes sought to be refunded in the above entitled matter were paid on the following dates, in the following amounts:

Dates Paid	Amounts
March 29, 1933.....	\$20.67
April 23, 1933.....	25.36
May 16, 1933.....	31.97
June 24, 1933.....	36.81
July 27, 1933.....	43.26
August 29, 1933.....	45.03
September 30, 1933.....	32.82
October 31, 1933.....	26.88
November 24, 1933.....	30.59
December 25, 1933.....	19.63
January 31, 1934.....	13.97
February 27, 1934.....	16.58
March 27, 1934.....	16.07 [14]
May 3, 1934.....	23.45
May 31, 1934.....	23.04
July 3, 1934.....	25.48
August 1, 1934.....	29.69
August 30, 1934.....	22.22
October 1, 1934.....	25.11
November 2, 1934.....	20.32
December 3, 1934.....	25.56
January 2, 1935.....	17.57
January 31, 1935.....	15.57
March 1, 1935.....	18.03
March 29, 1935.....	16.69
April 30, 1935.....	23.59
May 31, 1935.....	24.55
June 29, 1935.....	26.56
July 31, 1935.....	29.84
August 31, 1935.....	32.72

Dates Paid	Amounts
September 30, 1935.....	\$32.91
October 30, 1935.....	31.74
November 30, 1935.....	32.28
December 31, 1935.....	22.44
January 31, 1936.....	20.54
February 27, 1936.....	18.72
April 1, 1936.....	19.07
May 13, 1936.....	22.77
May 27, 1936.....	20.99
June 30, 1936.....	23.64
August 3, 1936.....	30.49
August 31, 1936.....	32.58
October 31, 1936.....	32.00
<hr/>	
Total.....	\$1,099.80

It is further stipulated that the Findings of Fact and Conclusions of Law and Judgment may incorporate these dates of payments and amounts so paid.

ADOLPHUS E. GRAUPNER
(Hoffner)

Attorney for Plaintiff.

FRANK J. HENNESSY

By ESTHER B. PHILLIPS

Attorney for Defendant.

[Endorsed]: Filed July 30, 1940. Walter B. Mal-
ing, Clerk. [15]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled court, Honorable Martin I. Welsh presiding therein, sitting without a jury.

Plaintiff appeared by its attorneys, A. E. Graupner and Theodore L. Breslauer, and the defendant appeared by its attorney, Frank J. Hennessy, United States Attorney, being represented by Esther B. Phillips, Assistant United States Attorney.

Witnesses were sworn and testimony given at the said hearing, and the court being fully advised in the facts and the law, makes its Findings of Fact as follows: [16]

FINDINGS OF FACT

1. The plaintiff, Moroloy Bearing Service of Oakland, Ltd., is, and at all the times involved in this action was, a corporation.

2. The plaintiff, in compliance with the demand of the Collector of Internal Revenue, under Paragraph c, Section 606 of the Revenue Act of 1932, made and filed a manufacturer's excise tax return each month from February, 1933, to August, 1936, inclusive; and because of such demand did pay to the Collector of Internal Revenue the total sum of One Thousand Ninety-nine and 80/100 Dollars (\$1099.80). The dates of payments, and amounts paid, were as follows:

Dates Paid	Amounts
March 29, 1933.....	\$20.67
April 23, 1933.....	25.36
May 16, 1933.....	31.97
June 24, 1933.....	36.81
July 27, 1933.....	43.26
August 29, 1933.....	45.03
September 30, 1933.....	32.82
October 31, 1933.....	26.88
November 24, 1933.....	30.59
December 25, 1933.....	19.63
January 31, 1934.....	13.97
February 27, 1934.....	16.58
March 27, 1934.....	16.07
May 3, 1934.....	23.45
May 31, 1934.....	23.04
July 3, 1934.....	25.48
August 1, 1934.....	29.69
August 30, 1934.....	22.22
October 1, 1934.....	25.11
November 2, 1934.....	20.32
December 3, 1934.....	25.56
January 2, 1935.....	17.57
January 31, 1935.....	15.57
March 1, 1935.....	18.03
March 29, 1935.....	16.69
April 30, 1935.....	23.59
May 31, 1935.....	24.55
June 29, 1935.....	26.56
July 31, 1935.....	29.84
August 31, 1935.....	32.72

Dates Paid	Amounts
September 30, 1935.....	\$32.91
October 30, 1935.....	31.74
November 30, 1935.....	32.28
December 31, 1935.....	22.44
January 31, 1936.....	20.54
February 27, 1936.....	18.72
April 1, 1936.....	19.07 [17]
May 13, 1936.....	22.77
May 27, 1936.....	20.99
June 30, 1936.....	23.64
August 3, 1936.....	30.49
August 31, 1936.....	32.58
October 31, 1936.....	32.00
<hr/>	
Total.....	\$1,099.80

3. The excise taxes so demanded and collected from the plaintiff as set forth in the preceding paragraph were in respect to alleged sales of certain automobile parts or accessories, to-wit, connecting rods repaired by plaintiff during the months for which the tax was demanded.

4. The Collector of Internal Revenue paid and remitted to the defendant said excise taxes so demanded and collected from the plaintiff as aforesaid, and the defendant received and still retains the same.

5. Within the period allowed by law, plaintiff filed with the Collector of Internal Revenue for the First District of California, its claim for refund

of the aforesaid excise taxes in the aggregate amount of One Thousand Ninety-nine and 80/100 Dollars (\$1099.80). Said claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States, and was so filed within four years after the date of payment of said taxes; and said claim set forth the reasons for, and the grounds supporting the refund of said taxes.

6. Thereafter, on or about the 23rd day of August, 1937, the Commissioner of Internal Revenue of the United States rejected and disallowed said claim for refund, and notified the plaintiff of such rejection and disallowance by letter dated the 23rd day of August, 1937.

7. The plaintiff did not include the aforesaid excise taxes with the price of the articles with respect to which [18] said taxes were imposed; and plaintiff did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles. The burden of said taxes was borne solely and exclusively by the plaintiff and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

8. The aforesaid excise taxes were imposed in respect to the activity of the plaintiff of rehabilitating old and used connecting rods, and exchanging said repaired rods for other old and used rods plus, in cash, the charge for repairing.

9. Plaintiff imported none of said connecting rods, but obtained all thereof from sources within the United States.

10. All of said connecting rods were originally manufactured by persons, firms, or corporations other than the plaintiff, and had been used as operating parts of automobile motors until the bab-bitt metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

11. The rebabbitting process, to which the above-mentioned used and second-hand connecting rods were subjected in plaintiff's shop, consisted of melting and removing therefrom the old and worn bab-bitt metal bearings, and of casting therein new bab-bitt metal bearings, and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

12. The connecting rods which were rebabbit-ted by the plaintiff did not lose their identity as connecting rods during, or as a result of, the re-babbitting process in plaintiff's shop.

13. None of the identifying symbols, trade-marks, numbers, or other identifying data appearing on said connecting rods was moved, marred, or obliterated during, or as a result of the rebabbitting process in plaintiff's shop, but on the contrary, all such identifying numbers and data were left intact.

[19]

14. A rebabbitted connecting rod is a second-hand connecting rod; and all of the rods which were repaired and exchanged by the plaintiff were second-hand rods.

15. The arrangement under which the plaintiff kept on hand, and in stock, a supply of rebabbitted connecting rods of various kinds and makes, was a matter of convenience to the plaintiff and its customers so that the customers of the plaintiff, by exchanging their old, used rods for rebabbitted rods and paying a consideration in cash for the rebabbing, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbing process to be completed upon the customers' own rods.

16. The rebabbing process performed by the plaintiff did not constitute the manufacture or production of connecting rods, but merely the repair, rehabilitation and reconditioning of used and second-hand rods.

17. The exchanges of rebabbitted connecting rods did not constitute the sales of automobile parts or accessories by the manufacturer, producer, or importer.

18. Under admissions contained in the pleadings and proofs submitted, the above entitled court has jurisdiction over the above-entitled cause.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes its Conclusions of Law, as follows:

1. The plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

2. The plaintiff is not, and was not during the times involved in this suit, the manufacturer, producer, or importer of automobile connecting rods within the meaning of [20] Section 606 of the Revenue Act of 1932.

3. The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer, or importer.

4. The excise tax imposed by Section 606(c) of the Revenue Act of 1932 does not apply to exchanges of rebabbitted automobile connecting rods by one who merely repairs old, worn connecting rods and who neither manufactures, produces nor imports such rods.

5. In holding and determining that the tax imposed by Section 606(c) of the Revenue Act of 1932 applied to exchanges of rebabbitted connecting rods by the plaintiff during the period from February, 1933, to August, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Revenue Act of 1932.

6. Under the evidence and the law, the plaintiff is entitled to judgment against the defendant in the sum of One Thousand Ninety-nine and 80/100 Dollars (\$1,099.80), together with interest at the rate of six per cent (6%) per annum on each monthly payment (which total sum makes up the aggregate amount).

Let judgment be entered in accordance with the above Findings of Fact and Conclusions of Law.

Dated: July 30, 1940.

MARTIN I. WELSH

United States District Judge.

Receipt of service July 30, 1940.

ESTHER B. PHILLIPS,

Ass't. U. S. Attorney.

[Endorsed]: Filed July 30, 1940. Walter B. Mal-
ing, Clerk. [21]

In the Southern Division of the United States
District Court for the Northern District
of California

No. 21308-W

MOROLOY BEARING SERVICE OF OAK-
LAND, LTD., a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT ON FINDINGS

This cause came on regularly for trial upon the 29th day of December, 1939, before the Court sitting without a jury; Theodore L. Breslauer, Esquire, and Adolphus E. Graupner, Esquire, appearing as attorneys for plaintiff, and Miss Esther B. Phillips, Assistant United States Attorney, appearing as attorney for defendant, and trial

having been proceeded with, and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings, and ordered that judgment be entered in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Moroloy Bearing Service of Oakland, Ltd., a corporation, Plaintiff, do have and recover of and from United States of America, Defendant, the sum of One Thousand Ninety-nine and 80/100 Dollars (\$1099.80), the aggregate of the following monthly payments:

Dates Paid	Amounts
March 29, 1933.....	\$20.67
April 23, 1933.....	25.36
May 16, 1933.....	31.97 [22]
June 24, 1933.....	36.81
July 27, 1933.....	43.26
August 29, 1933.....	45.03
September 30, 1933.....	32.82
October 31, 1933.....	26.88
November 24, 1933.....	30.59
December 25, 1933.....	19.63
January 31, 1934.....	13.97
February 27, 1934.....	16.58
March 27, 1934.....	16.07

Dates Paid	Amounts
May 3, 1934.....	\$23.45
May 31, 1934.....	23.04
July 3, 1934.....	25.48
August 1, 1934.....	29.69
August 30, 1934.....	22.22
October 1, 1934.....	25.11
November 2, 1934.....	20.32
December 3, 1934.....	25.56
January 2, 1935.....	17.57
January 31, 1935.....	15.57
March 1, 1935.....	18.03
March 29, 1935.....	16.69
April 30, 1935.....	23.59
May 31, 1935.....	24.55
June 29, 1935.....	26.56
July 31, 1935.....	29.84
August 31, 1935.....	32.72
September 30, 1935.....	32.91
October 30, 1935.....	31.74
November 30, 1935.....	32.28
December 31, 1935.....	22.44 [23]
January 31, 1936.....	20.54
February 27, 1936.....	18.72
April 1, 1936.....	19.07
May 13, 1936.....	22.77
May 27, 1936.....	20.99
June 30, 1936.....	23.64
August 3, 1936.....	30.49
August 31, 1936.....	32.58
October 31, 1936.....	32.00

together with interest at the rate of 6% per annum on the respective amounts, to be computed from the dates paid to a date preceding the date of the refund check by not more than thirty days.

Judgment entered this 31st day of July, 1940.

WALTER B. MAILING,
Clerk.

[Endorsed]: Filed Jul 30 1940. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the defendant, the United States of America, appearing by its Attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals from the judgment of the Court in favor of plaintiff in the above-entitled case, entered on or about July 30, 1940.

Dated: October 26, 1940.

FRANK J. HENNESSY,
United States Attorney,
ESTHER B. PHILLIPS,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 26, 1940. Walter B. Maling, Clerk. [25]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD ON
APPEAL

The defendant above-named having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on July 30, 1940, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal to the Circuit Court of Appeals for the Ninth Circuit in conformity with the rules of Federal Civil Procedure:

- (1) The Complaint;
- (2) The Answer, as Amended;
- (3) The Opinion of the Court;
- (4) Findings of Fact and Conclusions of Law, as Amended;
- (5) The Judgment;
- (6) The Transcript of the Testimony taken at the trial;
- (7) Stipulation made by the parties entitled "Stipulation for Transmittal of Exhibits", filed February 25, 1941. [26]
- (8) Notice of Appeal filed October 6, 1940;
- (9) All orders extending the time to docket the Record in the Circuit Court of Appeals, on file herein;
- (10) All Exhibits.
- (11) Stipulation as to dates and amounts of tax paid.
- (12) This Designation of the Record on Appeal.

Dated: March 21, 1941.

FRANK J. HENNESSY,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant United States
Attorney.

Receipt of service March 21, 1941.

A. E. GRAUPNER
Atty. for Plaintiff.

[Endorsed]: Filed Mar. 24, 1941. Walter B. Mal-
ing, Clerk. [27]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL
OF EXHIBITS

It is hereby Stipulated and Agreed by the parties hereto, appearing by their respective attorneys, that forgings numbered Plaintiff's Exhibit for Identification, 2, 3, 4, 5 and 6, now lodged in the Office of the Clerk of the United States District Court in the above-entitled case, not formally offered in evidence upon the trial of said case, may be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for use in the above-entitled case in the event of the docketing of the record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit with like force and effect as if they had been [28] formally offered

and admitted in evidence upon the trial before the District Court.

Dated: February 25th, 1941.

ADOLPHUS E. GRAUPNER,
Attorney for Plaintiff.

FRANK J. HENNESSY,
United States Attorney,

By ESTHER B. PHILLIPS,
Assistant United States
Attorney.

[Endorsed]: Filed Feb. 25, 1941. Walter B. Maling, Clerk. [29]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF ORIGINAL
EXHIBITS TO THE CLERK OF THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

It is hereby ordered that the original exhibits identified and received in evidence upon the trial of the above entitled case shall be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for use upon the appeal of said case.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Mar. 22, 1941. Walter B. Maling, Clerk. [30]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

Good cause being shown, it is hereby ordered that the defendant herein may have to and including January 16, 1941, within which to docket in the Circuit Court of Appeals for the Ninth Circuit the record on appeal in the above-entitled matter.

Dated: Dec. 2, 1940.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed Dec. 2, 1940. Walter B. Maling, Clerk. [31]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 21308-W

UNITED STATES OF AMERICA,

Appellant,

vs.

MOROLOY BEARING SERVICE OF OAK-
LAND, LTD., a corporation,

Appellee.

ORDER ALLOWING TIME FOR DESIGNA-
TION OF CONTENTS OF RECORD ON
APPEAL AND FOR DOCKETING REC-
ORD ON APPEAL

Good cause being shown, and upon motion of the United States Attorney for the Northern Dis-

trict of California, it is hereby ordered that the United States of America may have to and including February 6, 1941, within which to file its designation of the proceedings and evidence to be contained in the record on appeal, and to docket the record on appeal in the above-entitled case.

Dated: January 2, 1941.

CURTIS D. WILBUR

United States Circuit Judge

[Endorsed]: Ordered, etc. Filed Jan. 2, 1941.
Paul P. O'Brien, Clerk.

[Endorsed]: Order etc. Filed Jan. 2, 1941.
ing, Clerk. [32]

[Title of Circuit Court of Appeals and Cause.]

ORDER ALLOWING TIME FOR DESIGNA-
TION OF CONTENTS OF RECORD ON
APPEAL AND FOR DOCKETING REC-
ORD ON APPEAL

Good cause being shown, and upon motion of the United States Attorney for the Northern District of California, it is hereby ordered that the United States of America may have to and including March 6, 1941, within which to file its designation of the proceedings and evidence to be contained in the record on appeal, and to docket the record on appeal in the above-entitled case.

Dated: February 5, 1941.

FRANCIS A. GARRECHT

United States Circuit Judge.

[Endorsed]: Filed Feb. 5, 1941. Paul P. O'Brien,
Clerk. [33]

[Title of Circuit Court of Appeals and Cause.]

ORDER ALLOWING TIME FOR DESIGNA-
TION OF CONTENTS OF RECORD ON
APPEAL AND FOR DOCKETING REC-
ORD ON APPEAL

Good cause being shown, and upon motion of the United States Attorney for the Northern District of California, it is hereby ordered that the United States of America may have to and including April 1, 1941, within which to file its designation of the proceedings and evidence to be contained in the record on appeal, and to docket the record on appeal in the above-entitled case.

Dated: March 4, 1941.

CURTIS D. WILBUR

United States Circuit Judge.

[Endorsed]: Filed Mar. 5, 1941. Paul P. O'Brien,
Clerk. [34]

District Court of the United States, Northern
District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 34 pages, numbered from 1 to 34, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled *Moroloy Bearing Service of Oakland, Ltd.*, a corporation, Plaintiff, vs. *United States of America*, Defendant. No. 21308-W, as the same now remain on file of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.70 that said amount has been charged against the United States.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of April A. D. 1941.

[Seal]

WALTER B. MALING

Clerk.

WM. J. CROSBY

Deputy Clerk. [35]

The Court: Proceed.

Miss Phillips: At this time, may I ask the Court leave to file a supplement to the answer on behalf of the defendant United States of America.

Mr. Breslauer: There is no objection.

The Court: So ordered.

Mr. Breslauer: I do not know whether your Honor is familiar with the case to be tried here this morning, but it is a case involving return of excise tax paid under Section 606c of the Revenue Act of 1932. I believe that the attorney for the defendant will bear with me that the corporation—the capacity of the plaintiff is admitted; it's principal place of business is located in the city of Oakland, which is also admitted; the sovereignty of the United States is admitted, the payment by the plaintiff to the government, in the sum of \$1099.80 is admitted. The articles of incorporation of the plaintiff and the files and correspondence denying the claim, by the government, for refund are admitted.

Now while we are suing the United States, the payment was made to the Collector of Internal Revenue here. I presume the money was paid by the Collector——

Miss Phillips: (Interrupting) Paid to a collector no longer in office, which entitles them to sue the United States direct for refund instead of suing the Collector.

NELSON N. SCOTCHLER,

Called as a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

The Court: May I suggest that you make an opening statement as I have always found it much easier to understand the testimony if counsel will make an opening statement, so that the Court can get the theory of the case. [38]

Mr. Breslauer: If you will bear with me while I make an opening statement for the plaintiff. I don't know whether your Honor knows about automobiles or not.

The Court: Well, I know something about them.

Mr. Breslauer: This is what we call a connecting rod. (Attorney exhibits connecting rod to court) It is composed of an iron shank, with what we call a bearing made of babbitt metal inside. This particular instrument connects the motor with the propelling apparatus of the automobile. Then, when the automobile is new, it is equipped with a rod that is factory installed—that particular rod (indicating) has the mark of the Chevrolet factory connecting rod. In the proper time we will offer this. Now this bearing here made out of babbitt is installed there for various purposes, one of which, of course, is that there should be a proper connection between the driving and propelling part of the automobile. It is made of a soft metal, so for security, if anything happens, the metal will go out

(Testimony of Nelson N. Scotchler.)

and the worn down metal also goes out. The process of the plaintiff in this action is that when the bearing has worn out, they take a shank, either the worn out shank out of that particular automobile or another shank and put new metal in there.

The Court: You mean rebabbitt the metal. This one, I presume, is one that has been rebabbitted by the plaintiff in this action.

Mr. Breslauer: We will show the various steps taken.—

The Court: In other words, the babbitt as it appears there in that bearing is poured, is that it?

The Witness: That is correct. It is poured in there and machined down to size.

The Court: Then the issue is a question of whether it is a repair or a manufacture. [39]

Mr. Breslauer: I think we can develop this with evidence, as well as by my statement.

Q. Mr. Scotchler, what is the business of the plaintiff corporation?

A. We are in the business of repairing or rebabbitting connecting rods for the automotive industry generally, in this part of the country. That is to the repairing automotive jobber, who, in turn, sells to the garage or repair men. We also conduct in our business, the sale of other automobile parts, which we buy from manufacturers and we distribute that to the same trade too.

(Testimony of Nelson N. Scotchler.)

Mr. Breslauer: Now will you explain to his honor——

The Court: (Interrupting) Do I understand that one part of your business is to rebabbitt these connecting rods. In other words, if an engine should break down because of that particular trouble that they would pack the engine to your factory and you would take the bearings out and rebabbitt them.

A. No, if an engine should break down due to the burning out of the connecting rod that connecting rod would be taken out of the car and eventually get to our plant for rebabbitting.

Mr. Breslauer: In other words, you don't manufacture the bearing and send it to the automobile agency to be installed, you don't do that?

A. No, the bearing becomes a component part of the shaft after it is rebabbitted to factory specifications. After we babbitt it, it becomes a component part of the rod.

Q. I show you this bearing, this piece of iron, is that the condition in which rods come in to your plant?

A. That's the condition in which rods reach us.

Q. You might show his honor the various marks on this shank.

A. These various forgings, as they come to us, are made by different factories—supply automotive factories and they put in individual marks on

(Testimony of Nelson N. Scotchler.)

the connecting rods in order to identify them and in order to tell from which forging factories they come from. [40]

Q. Now that forging consists of two pieces?

A. Correct.

Q. A shank and a cap? A. Correct.

The Court: Pardon me. From your last statement am I to understand that those shanks are manufactured——

The Witness: Correct.

The Court: —and sent to your factories for babbitting?

The Witness: No, these forgings are manufactured originally and supplied to—for instance, in this case as this is a Chevrolet connecting rod, the discussion will be in that way—I can probably explain it more simply to you. The Chevrolet factories will put out an order for so many connecting rods and these forging factories make them and place identifying marks on the forgings so that they can tell from which forging factories they come from. On this bearing is the mark, on the inside of the Chevrolet Motor Company, others bear the mark of General Motors and others have marks on the inside of which we are not familiar with and don't know just exactly what they do signify. These rods eventually get into a new car and go out on the road and then when they burn out they come to us to be rebabbitted. The only way they come to us

(Testimony of Nelson N. Scotchler.)

is after they have been in the new car and in the course of the use of the rod, it has been damaged.

Q. In other words, this new connecting rod with the bearing is in the condition in which it is originally installed in the engine and the component parts are the same as here, for the reason that it is an original bearing. Now, these bearings consist of a shank—a metal shank and a cap, which are bolted together by screws, bolts and nuts?

A. Correct.

Q. When these bearings come in to you what do you do with them?

A. When they reach our place they are first dipped in a pot and then the bolts and nuts are taken out—the bolts and nuts are set [41] to one side by the cap, so that the same cap gets back with the same shank. After they are separated, they are dipped into a hot babbitt pot, so that we burn out any oil and babbitt which may be there, so that the new babbitt which we install, would stick to it properly. After it is cleaned and been heated with hot babbitt we use a preparation which is more or less known throughout the industry. Such substance is a chemical powder which tends to burn out all such oil or babbitt away from it. When that is completed we then pour in the new babbitt.

The Court: In other words, all you do is to make a repair.

(Testimony of Nelson N. Scotchler.)

A. That is correct.

Q. Then, after the babbitt has been poured in, it still is in a rough condition before machining?

A. We use some old nuts so as not to damage the thread. Then finally here is the finished product after it has been machined out.

Q. Now, in this process, nothing is done with the connecting rod itself?

A. Nothing. There is no defacing work or change made with the rod itself or any identifying marks are not altered or changed in any way.

Q. Will you explain to the court the method of distributing these repaired rods?

A. In order to render the user of a car—take your own car, for instance—you had a connecting rod go out. In order to save time and make possible deliveries on the road, we supply our customers, who are wholesale automotive jobbers, with a general stock of these rods, so that, if a connecting rod went out, we will say in the vicinity of San Jose, you wouldn't have to go to the factory, you wouldn't have to go to the agency, but your nearest garage would be in contact with a supplier or jobber and he would secure a rod, which was identical with the rod which came out of your car, already rebabbitted, repaired and ready for use. [42] He would take that rod from the wholesaler or jobber and immediately take the rebabbitted rod back and install it into the car. We supply our jobbers with

(Testimony of Nelson N. Scotchler.)

a general stock of job numbers. They buy rebabbitted rods from us in anticipation of orders which they are going to get from their customers in the course of time. I think it will be well to bring in at this point that in the course of time those rods, after they become obsolete and out of date, part of our service to our customers is to take those rods back from them and issue credits to them. As far as that is concerned, in the sale of the forging to our customer, the forging is merely a carrier to enable the bearing to get to the customer in a short space of time; so that the money that the jobber has invested in obsolete forgings, he is eventually relieved of, as we absorb that ourselves.

The Court: That is quite an expensive transaction to put in a rod that is in first class condition as a substitute for a rod just taken out of an engine to be repaired. You have to take the engine down to take the rod out and tear it down again to get the rod back into the engine.

A. If your car had burned out a connecting rod to all intents and purposes, you wouldn't be able to drive it at all. The garage man could take off—in the average automobile, the inspection plate on the bottom of the crank case. He would also take off the cylinder head on the automobile. I think with those two parts removed he is able to slip out of the bottom of the motor block, the damaged connecting rod. Then the piston also comes out.

(Testimony of Nelson N. Scotchler.)

He then attaches to the bearings the rebabbitted connecting rod and puts it right back into the motor again. So that one taking a motor down, only as far as that component part goes, it is an operation which can be done in less than two hours. I can say, often in less than that; but I would say the average time [43] would be about two hours.

The Court: That rod stays in there—the substituted rod—the government indicates the rod was replaced.

A. The rod that comes out there, goes to the jobber, who might be within a mile or so from where he is. There are jobbers in all important towns. He would get an exchange rod immediately, and then he goes right back and continues the job. Two hours would probably be the maximum for completion of the operation. Then the jobbers send the old rod back to us and we eventually replace that on his shelves with a rebabbitted connecting rod.

Q. Now in your business, at no time do you use new forgings at all? A. No, we do not.

Q. And the particular cap and shank that you are rebabbitting must always be 100% efficient?

A. Absolutely.

Q. It could not be a bunch of scrap iron or junk? A. No.

Q. In obtaining these rods sometimes you buy them from outside sources, is that correct?

(Testimony of Nelson N. Scotchler.)

A. Correct.

Q. Then, those must be as good as new rods?

A. They must be in good condition. In other words, they could not be bent, damaged or dented or the holes for the bolts couldn't be and would have to be to all intents and purposes, in as good condition as an original rod was, as far as the forging was concerned.

Q. Now then do you use a rough forging? You are not equipped to make a rough forging into a connecting rod?

A. No we are not equipped to make a rough forging into a connecting rod.

Q. May I ask this—in delivering this rod to the distributor, some charge is made for the rod, is it? A. Yes.

Q. But, over a period of time, is there any profit made?

A. Over a period of time, I would say there was no profit at all, for when we furnish these rods, we issue a credit to him. The amount that [44] we issue as a credit is generally more than any possible margin of profit that we made in the first place, on it. We are obligated to take all rods back that we sold to him. Again, some might not get back, but the great majority do. We make a charge for that forging to the customer originally, merely to protect ourselves, in case the rod shouldn't come back.

(Testimony of Nelson N. Scotchler.)

Q. In other words, the method of distribution is one of exchange and not an outright sale, and when the forging comes back, if a similar forging comes back, he is credited with the amount?

A. Correct?

Q. With reference to this tax, has any of this tax been charged to the person that you delivered the rod to?

A. No, it has not.

Q. The price of the bearing is fixed by you as a competitive one? There are how many companies around this district?

A. In the bay district, there are two other companies beside ourselves that are prominent in the field. There may be other smaller ones.

Q. One is the Pioneer Motor Bearing Company?

A. Yes.

Q. Do you recall the name of the other company?

A. The Federal Mogull Corporation.

Q. That is an Eastern corporation?

A. Yes.

Q. And there is also one in Los Angeles?

A. There are several others in Los Angeles.

Q. And they also deal in the same districts that you do?

A. They cover part of the same territory that we do.

Q. But no part of this tax has been passed on?

A. No.

(Testimony of Nelson N. Scotchler.)

The Court: So that I will get your testimony clear. Now if I may ask you again. We will say a Chevrolet automobile had broken down because of some defect in the rod—the bearing in the rod. He drives that car into a Chevrolet garage and the garageman tears down the engine to the extent where he can get ahold of this defective [45] rod, and pulls it out. He goes over to a shelf and takes down a rod which you have supplied him with, installs that, then puts the engine back in shape and the man leaves the garage with the car repaired. Then he takes and sends you the rod which was defective, which you rebabbitt and send back to the garage man and the garage man places it on his shelves and some person comes in under similar circumstances. A. Correct.

Q. You do nothing with reference to the repairing of the automobile itself? A. No.

Q. Now, I think we have covered it. In repairing the babbitt, in no way defaces the shank or the capping? A. No.

Q. You don't change or alter it in any way? In other words when it comes out of your place, it is just the same as when it came in with the exception of being a rebabbitted bearing?

A. Yes.

Q. There are a couple of questions I would like to ask with reference—has the plaintiff, at all times, borne true allegiance to the government of the United States? A. Yes.

(Testimony of Nelson N. Scotchler.)

Q. Has any other claim for refund been made for the recovery of this tax?

A. None other than the present one.

Q. And the recovery of this tax has not been sought in any way but by the filing of this claim for refund and on its refusal, the filing of this present action? A. Yes.

Q. This claim for refund does not seek recovery of any tax, other than the recovery of \$1099.80 tax paid? A. Correct.

Mr. Breslauer: That is all.

Cross Examination

By Miss Phillips:

Q. In answer to one of the last questions, I understood you to say that when you received a connecting rod from the garage, such as you mentioned, and let us say a garage in San Jose sends up to you, [46] that you put it in order again, and send back that identical rod to that identical place?

A. I might explain that in this way——

Q. But now, let me ask you, did you say that?

A. I might have inferred it.

Q. Was that the fact?

A. Not necessarily.

Q. All right, let us have a correct statement?

A. The identical rod, it might be that the identical rod in the ordinary process, might get back to the identical place, from which it came, but for

(Testimony of Nelson N. Scotchler.)

general purposes we will assume that another rod of identical description would go back again.

Q. How many types of rods do you carry in stock? A. Well, I could only guess.

Q. Would you guess as much as one hundred?

A. I would say more than that.

Q. As much as two hundred?

A. I would say possibly two hundred and fifty.

Q. And those rods would be designed to be used in the automobiles, which in your experience, are most common in use? The different types and makes—you do not go for rare, foreign cars, but you use the cars that are most commonly used?

A. Correct.

Q. You say you have two hundred and fifty, possibly two hundred and fifty rods, you don't have just one rod of each type? A. No.

Q. Can you give me a reasonable estimate of the amount of stock you have on hand?

A. We probably have a total, at the present time, it was possibly a little less during the period which this action covers, at the present time I would make an estimate of about four thousand connecting rods.

Q. What is your source of supply for those rods?

A. We have bought most of them, I would say ninety-five percent or more from people who make a business of collecting through wrecking companies

(Testimony of Nelson N. Scotchler.)

and [47] other sources. They buy these old forgings and they are in business to sell for repairs, throughout the United States. I would say that ninety-five percent or more of our forgings come from six different companies.

Q. People who wreck automobiles and take out usable material—junk men?

A. No, I would say possibly one or two or three per cent might come from junk men. Ninety-five per cent or more have come from—some concerns are in business of wrecking automobiles—but most of them are in the business of collecting from wreckers, the forgings and they have developed a business of such extent to sustain themselves in very good style, collecting forgings, and repairing them for redistribution to the rebabblers.

Q. When you have a whole pile of boxes of forgings come in from one of these wreckers, what is the first thing you do?

A. We sort the rods out to see that they agree with the order that we ordered from them, and also inspect them to see that they are not damaged. If they are damaged in any way they are immediately thrown out.

Q. I would assume that occasionally in accidents or by use, a rod becomes bent or dented?

A. Correct.

Q. Now, that is the kind of thing you are watching for, and your first job is to clean and inspect

(Testimony of Nelson N. Scotchler.)

and discard any in which there is any danger of cracks or bending or denting, is that correct?

A. Yes.

Q. Can a rod be straightened, if it is just slightly bent or dented?

A. If it is slightly bent, it can be straightened.

Q. Do you occasionally do that sort of work?

A. Yes, occasionally.

Q. So then your first job is to inspect and discard those which are bent or dented beyond any possibility of ordinary repair. Those, which are not in perfect condition, but which can be put in order, your job there would be to iron out the dents or straighten or remove the dents?

A. Yes, I would feel that I should add in that con- [48] nection probably about one-tenth of one per cent come in, in that character.

Q. Usually the wreckers are watching for that?

A. Yes.

Q. Now, your next task is to take out the bolts?

A. We remove the bolts if the bolts are in the rods. Often times the rods——

Q. (Interrupting) Which would you say was more common?

A. With bolts is more common. We remove those so that in the cleaning and tinning process, the tin or old babbitt which would then be in a molten condition would not seal the bolt into the holes——into the rods so it would be difficult to get them out again.

(Testimony of Nelson N. Scotchler.)

Q. But when they use these old bolts, would you ever put those same bolts back?

A. Many times, we use old bolts, if the threads are in good condition, we continue to use them. If however, they are stripped or damaged we put new bolts in them.

Q. Which would you say is more common, or is it about fifty-fifty? Could you distinguish between the two?

A. I would not say definitely. Most of them we use old bolts.

Q. Do you have to rethread the bolts?

A. No, we never do.

Q. If the bolt is damaged or the threads injured at all, you use new bolts?

A. A great many are repaired.

Q. How is the old iron melted out of the forging?

A. By dipping the old forging as we receive it into a pot of molten babbitt.

Q. And that melts out the old babbitt?

A. Yes, it quickly melts out what babbitt remained in the rod.

Q. We have been using the word "babbitt". Babbitt is an alloy, is it not? A. Correct.

Q. Something approximately eighty-five or eighty-six per cent copper? What is babbitt?

A. The babbitt which is used by ourselves and generally in the rebabbitting industry contains from

(Testimony of Nelson N. Scotchler.)

eighty to ninety per cent tin and from five to five and one-half per cent [49] antimony, and about the same proportion copper.

Q. The principle components are antimony, tin and copper? A. Correct.

Q. The old alloy is melted out and tin is pressed in? A. Correct.

Q. How do you do that?

A. By dipping a rod, which has been heated in old babbit—as far as that goes to some 750 degrees or approximately that—that rod is dipped in tin, molten tin, prior to that I would say that the rod—the forging is treated with a chemical compound which causes, when it is hot, the tin to adhere to the rod, the chemical compound acts as a flux to assist the tin in adhering to the metal.

Q. Let me see if I have the order of events. First is the cleaning and examining of the forging, to make sure there are no bends or dents. Then to take out the bolts? A. Correct.

Q. (Continuing) Then melt the old alloy?

A. Correct.

Q. (Continuing) Then give the forging an acid bath or something—a chemical bath? A. Yes.

Q. Then put it in molten tin so that the tin makes a surface on it and a bond between the forging and the new alloy? Have I got what you do?

A. That is correct.

Q. Now, you say, when you babbitt it, what is

(Testimony of Nelson N. Scotchler.)

the process you use in putting in this new alloy?

A. In our particular process, we put that babbitt in by a spinning process—the word spinning is an expression which is commonly used in the industry. In our particular process—ninety per cent of our rebabbitting is done by the spinning process, where the bearing end of the forging is put in an apparatus which whirls the rod around but this bearing remains constant. When the rod is whirled into the position, the babbitt is then poured into this portion of the rod (indicating) and by centrifugal motion it is forced to the outside of this circle (indicating) and adheres to the tin surface of the forging.

Q. It is really—what you are putting it in is a centrifugal casting machine, which is put in operation, and when running whirls at high speed?

A. Correct.

Q. Now, the other processes by which it is possible to put an alloy in a casting, such as this can be done by gravity?

A. We do some of that also.

Q. It can be done under pressure, can't it?

A. I believe some people do use that system.

Q. The other one is by rapidly revolving the bearing and pouring it in—putting this alloy in—by centrifugal force by this machine. It is called a spun bearing and you advertise, do you not, that the Moroloy Bearings are processed by the spun bearing process? A. Correct.

(Testimony of Nelson N. Scotchler.)

Q. Well, now we have the alloy in the forging? It is spun as you have described it. What is the next step?

A. Well, different rods have two or three intermediate steps.

Q. Let us have the intermediate steps?

A. Some rods, for instance, this particular rod, the Chevrolet rod, which represents a very large proportion of our rebabbitting work, the next step, the shanks are not separated again, once they are bolted up in position, for the spinning of the bearing, they are not separated again. Some rods, due to the fact that they take a shim are separated, the cap from the shank, and shims are put into them in order to comply with the practice which is set forth by the particular factory which originally made the forging and rod.

Q. A shim is a thin, very thin piece of brass, and at what stage do some rods have shims put in?

A. You mean in our process? After the babbitt has been roughly poured we use a saw to saw these small eggs of babbitt which overlap right here (indicating) and goes down into here (indicating.)

[51]

The Court: So the whole issue is whether they are repairs or manufactures.

Miss Phillips: We think it is a manufacturing process. He has already told about three or four processes to do the rebabbitting as it is done in their

(Testimony of Nelson N. Scotchler.)

factory. They sell them to the garage men, who place them on their shelves, and in the event that a Chevrolet car comes in subsequently, for repair, to the shank or the rod, as you call it, the rod is taken out and the garage man then goes to a shelf and takes one of the rods which his company has manufactured and replaces the rod that has been injured. It is a question, now, whether they are manufacturers, in supplying those garages, or whether they make repairs to rods which become defective. He has just said that over ninety-five per cent of their source of these rods do not come from isolated garages or rod companies but come from people who are in the business of sending them in, in large lots. I would take it from what he said, the isolated case, the case of the rod being sent in from the garage, weren't many rods; that the source of supply from that is not over five per cent. Most of them come from people in the business of wrecking, buying from wreckers I don't think we can pay much attention to the individual owner who brings in a car with a rod which needs changing or which has been bent or damaged. These people have to get most of the material in from people buying from wreckers. They first inspect and discard any bent or dented rods, then start in from there. I don't believe we have got all the processes before your Honor in these cases. He has just described in these cases, a process by which after

(Testimony of Nelson N. Scotchler.)

the bearing comes out of the—having this new alloy put in, they knock it to pieces again, and now put in shims? What is this anyway? I am saying this is a manufacturing process.

Mr. Breslauer: I think there is confusion here in the testimony [52] as to where these rods come in from for rebabbitting, by Mr. Scotchler. He said that ninety-five per cent of the rods were purchased from outside sources. I don't think he means that of the total amount of business. I think we ought to get that straightened out. It seems to me the whole issue is whether they manufacture a bearing.

Miss Phillips: It is whether the whole process is one of manufacturing. In manufacturing, a bearing, the whole process is——

Mr. Breslauer: They certainly do not manufacture rods. It is a question whether they manufacture bearings.

The Court: Proceed.

Miss Phillips: You just said, now, that for some rods, when they take it out of the alloy—the babbitt kettle, they would have to begin setting in shims. That applies to some rods, not to all rods?

A. By all means. Here is a rod which has had the babbitt melted out. Now a shim—in some rods—factory specifications, referring now to automobile factories, call for the use of shims in some rods, just like washers. When they are specified in the factory specifications we put one in the bottom here

(Testimony of Nelson N. Scotchler.)

(indicating) at one stage, after we have completed pouring the babbitt into the rod. Now following the shims being put in, then we put the bolts in and the nuts on the other end, and bolt and clamp the forging and cap firmly together. It is then taken to a machine and the bearing is machined out to the required size and finally broached.

Q. When you say it is machined out, what do you mean by that?

A. It is put in a machine where the cut is made on the inside of the surface to bring it to the required size. Also in the same setup, the surface on the other two sides are also machined so that they will comply with factory specifications.

Q. Then?

A. The broaching is the final operation which follows [53] the machining operation.

Q. How do you use the broaching machine?

A. The connecting rod is placed in a horizontal position and the broach is a tool, which is pressed down and through the bearing and as it goes through, there are cutting surfaces on it that cut the metal and make it measure according to specifications, as to any specific makes of cars.

Q. Do you use any bushings at any stage of the process?

A. This particular connecting rod does not use bushings. This is the clamping type. Some connecting rods use bushings on this end (indicating) and

(Testimony of Nelson N. Scotchler.)

if they do, we put new bushings in that rod to replace the ones which were formerly there.

Q. What is the use of a bushing in a rod like that?

A. The bushing connects the connecting rod to the piston through a piston pin and the piston pin sets that bushing firm against the pin.

Q. And when it goes back in stock, it is cleaned, is it?

A. It is cleaned and *emersed* in an anti-rust solution so that it will not rust on the shelves.

Q. Do you manufacture any rods?

A. None at all.

Q. Mr. Scotchler, in describing the process that you have testified to, you mentioned somewhere along the line that the original forging manufacturers supply the forging to the automobile factories? A. Correct.

Q. From your testimony, I would take it you have worked in automobile factories, have you not?

A. No.

Q. But you are familiar with their method of operation? A. Yes, I am.

Q. Now when the original manufacturer of this forging—when he sends this to the automobile factory it goes to the factory without any alloy in here (indicating) at all, doesn't it?

A. That I am not prepared to say, I don't know. The forging factory may complete [54] the

(Testimony of Nelson N. Scotchler.)

rod completely so far as I know. I can't say "Yes", or "No" as to that.

Q. The chief element of the forging is just ordinary iron—the heavy part of the rod, before they add any bolts or any bushings or shims or alloy or anything else?

A. I have seen the forgings as they come, they are commonly drop forgings. I think, in most cases, they are steel, not iron. That forging as I have seen it, has no hole bored in this end (indicating) or nut holes at all. It is simply a drop forging. All this machine work has to be done afterwards. Whether that is done in the forging factories or in automobile factories, I am not prepared to say.

Q. You would imagine that from your experience—you would judge that some forging manufacturers send to the automobile factories, just the drop forging, no holes, nothing; whereas others send it *already* to have bushings or bolts added to it?

A. Well, to tell the truth, I couldn't say positively "yes" or "no". I don't know.

Q. How does the process which you have just described, which is done in your factory, differ from the original babbitting of that forging?

A. I have never seen the complete operation in the factory but from what information I have, the original forging is babbitted by the centrifugal or spun process. At the time the forging and the shank, at this end, (indicating) of the forging have to be

(Testimony of Nelson N. Scotchler.)

separated, they are separated after the babbitt has been poured in.

Q. You are not sure of that?

A. I have never seen it, but all my information is to that effect.

Q. Your business extends from approximately Merced to the Oregon line, does it not?

A. Fresno to the Oregon line.

Q. Supplying jobbers and automobile supply houses, throughout that area, these connecting rods?

A. Correct.

Q. Do you advertise yourselves as specializing in these spun [55] bearings?

A. Our catalog states that we make bearings or repair rods by the centrifugal process.

Q. That you make bearings?

A. I would say, rather, that the catalog states rebabbitting or repairing of rods.

Q. You do not advertise as manufacturing rods?

A. No.

Q. Have you not in the past?

A. The boxes as used at one time, that was some years ago, did have the word that they are manufactured. That word was used but it has not been used for some time now.

Q. Do you give your dealers any guarantee as to the usefulness or service life of these rods?

A. We guarantee the work that we do. We do not guarantee the forgings themselves.

(Testimony of Nelson N. Scotchler.)

Q. I notice on the box, which counsel has handed me, from which one of these bearings came, the word "Guarantee". "We agree to replace this assembly if defective in material or workmanship." You say you guarantee your work?

A. Our work. We do not guarantee the forging itself.

Q. Your box on the face says "We guarantee the assembly". The word used on that box "Assembly" the bearing assembled to the rod. "We agree to replace this assembly, if defective."

A. That guarantee, which I have verbally stated, is the one accepted by the trade. It is well known and well understood, to the work which we do.

Q. The letters on the box does not indicate that. It indicates that it is the whole rod, and the babbitting and everything—the assembly when it is put together.

A. I will say, very definitely, that all our customers have at one time or another, had a statement, to the effect that our guarantee extends to the work, which we have done, on that connecting rod. If the connecting rod should happen to break, unless they can show that it broke through some fault of [56] ours, we would not do anything with the connecting rod. They would have to show that the break was caused as a result of the repairing work on the forging.

Q. Tell me, when you sell these rods, you sell them in your own boxes, do you not?

(Testimony of Nelson N. Scotchler.)

A. Correct.

Q. The box you have on the shelves—the orders which you have finished, each one appears in a proper box and is properly marked, for the car to which it is to be used? A. Correct.

Q. And your advertisement will have—it specifies it for a particular car? A. Correct.

Q. Now, going back to that matter of the source of your material. Did I misunderstand you, when I questioned you—I thought you said that ninety-five per cent of the rods, which you machine, and rebabbitt and go through all this process, which you have described, come from purchasers of automobile wreckers?

A. I think that I misinterpreted your question originally. I think that I can explain that definitely in this way. As I stated, to your Honor, earlier in the case, we supply our jobbers—the jobbers are our customers, our immediate customers, we supply them with various rods of popular makes of cars. The rods, which we supply them with, naturally, we have to secure from some source. The rods which we secure, from those sources, only represent a small proportion of the rods which are rebabbitted and repaired. The great majority of the rods, which are rebabbitted and repaired are those, that come out of the car, which is in actual use.

Q. The rod, which you handle, in other words, is a used rod and that rod you put in condition, by

(Testimony of Nelson N. Scotchler.)

rebabbitting it, so that it can be substituted for a rod that breaks down in the car?

A. Correct.

Q. The only part that you really manufacture is the babbitting, is it not?

A. If you wish to term it that, that is the only thing we [57] do. We sell them as rebabbitted or reconditioned rods.

Q. In several places, your Honor will see "Repairing and Rebabbitting". That is three times, I read the word "Repairing". Do you ever use any new forgings?

A. No, we do not rebabbitt new forgings.

Q. How do you supply a customer, who comes in for a rod, which is not a common rod?

A. We will—if one has not been used, and cannot be secured in the ordinary course, or from the ordinary source of supply—we are occasionally compelled to go to the car dealer or distributor of that particular make of car. As long as we have been talking about Chevrolet, if we did not have one in stock, we would go to a Chevrolet dealer and purchase a rod, and send that rod to the customer. We would do no work on that rod.

Q. That is, if your jobbers ask for a rod, which you do not have in stock, you make it your business to go to a manufacturer, and buy a brand new rod, and supply it to your jobber?

A. Correct. That does not occur very occasionally, it does occur sometime during each year.

(Testimony of Nelson N. Scóthler.)

Q. Do you assign your own stock numbers to these representative rods?

A. Merely for a means of identification, so when a customer gets it, he will be able to identify just as to what it is. He is not familiar with the box of the automobile factory. He is only familiar with the identity of our box.

Q. I am not quite sure of your answer. Each box, as it goes out, has your stock number on it, which does not correspond with the original number, which the original manufacturer might have?

A. That is correct.

Q. So that if your jobber needs some more of that type, he writes in to you, or phones to you, for your stock number? That is right.

Mr. Breslauer: That stock number is not on the rod itself?

A. No, just on the box. [58]

The Court: We will take a short recess.

After Recess

Miss Phillips: Do you wish this container in evidence?

Mr. Breslauer: We offer the box, if your Honor please.

(Box marked Plaintiff's Exhibit 1)

Redirect Examination

By Mr. Breslauer:

Q. Mr. Scotchler, you spoke of two or three different methods of inserting the bearing. I won't

(Testimony of Nelson N. Scotchler.)

say inserting but whatever you do to it, is there anything different in the result obtained?

A. No, to all intents and purposes, it is the same.

Q. Now, all the rods, that you handle have been, already, tax paid? A. Correct.

Q. By the original manufacturer, or the automobile concerns?

A. Correct. I believe many of our invoices which come from other concerns have marks that they are tax paid. I could not say without looking at them. It is my impression that some of them are, at least.

Q. Where they are originally manufactured?

A. Yes.

Q. To the best of your knowledge, that is true?

A. Yes.

Q. Now, counsel asked you with reference to these various operations, the cost of shims for instance. About how much is the average cost of shims?

A. About ten cents a hundred, ten cents approximately.

Q. And new nuts? A. One or two cents.

Q. And bushings?

A. They run two or three or four cents. Nuts, I believe, are less than two cents.

Q. You do not manufacture any of those?

A. No, we do not.

Q. Those various items are all tax paid?

A. All tax paid.

(Testimony of Nelson N. Scotchler.)

Q. Now, you enumerated seven or eight transactions—How long does it take to complete the entire transaction?

A. A connecting rod [59] can be put through within a matter of fifteen or twenty minutes, from start to finish.

Q. Some of the proceedings like putting in shims, is a matter of seconds?

A. The broaching process takes but three seconds as an average. Then, of course, added to that, are the routine examination of bearings, to find if they are in proper alignment.

Q. Whether the nuts and bolts are sufficiently strong to be used?

A. Well, with respect to the bolts and nuts, we buy those, they are new.

Miss Phillips: I thought you testified——

Witness (Interrupting) We examine some of the old bolts to see if they are in good condition.

Q. The metal that is put in there, the tin, anti-mony, et cetera, do you buy that prepared?

A. We buy that already prepared.

Q. Do you add anything to that to change it in any manner? In other words, the metal we see in this completed bearing is the same as it came from them? A. Correct.

Q. I understood you to say with reference to the obtaining of this supply of these rods that occasionally you had to obtain some rods some place

(Testimony of Nelson N. Scotchler.)

for convenience, but the biggest part of the rods come in used, and are rebabbitted in your shop?

A. In the circulation of the various rods, correct.

Q. You might rebabbitt the same rod more than once? A. Oh, yes, entirely possible.

Q. And they come in from men that you supply who in turn supply the customer? A. Correct.

Q. And there is no difference at all between that rod and the original rod? The one that came in from the automobile, when you put it back in the automobile?

A. No difference as far as—to all intents and purposes it is the same as the original rod from the fac- [60] tory.

Q. But it is advertised and sold as a used rod?

A. It is sold as a rebabbitted and repaired connecting rod, yes.

Q. Mr. Scotchler, about how many—you testified you had about four thousand rods in stock. About how many rods do you rebabbitt in a year?

A. In the neighborhood of fifty thousand I would say.

Q. Or more?

A. Possibly more. Yes, I think very likely more.

Mr. Breslauer: That is all.

Recross Examination

By Miss Phillips:

Q. Mr. Scotchler, you say that the original manufacturer of this forging had paid a tax on it?

(Testimony of Nelson N. Scotchler.)

A. I naturally had assumed that.

Q. Had you in mind either Regulation 42 or Regulation 46 of the excise tax laws, which provides that parts and automobile accessories sold to manufacturers of automobiles do not pay tax. Didn't you make an assumption without knowing very much about it?

A. Well, I do know that in many cases, we have had definite word that the articles have been tax paid.

Q. It is a provision of the regulations that where the manufacturer of the forging sells the forging to an automobile manufacturer, it does not bear a tax.

A. But is it not true that the automobile bears a tax as a whole?

Q. As a whole. That is why the manufacturer of the forging who sells it to an automobile manufacturer does not pay a tax on it. Now, when you say that you did not pass on a tax to the purchaser, but that you had paid this, and the suit for refund is for a refund back to January, 1933, is it not?

A. I believe the date is approximate. I would have to refer to our records for that. Whatever it is the documents would undoubtedly show that.

Q. Well, I will show you here, a report of manufacturer's excise tax for January, 1933, sworn to on date of February 23.

A. I be- [61] lieve my recollection is correct that this tax started in April of 1933.

(Testimony of Nelson N. Scotchler.)

Q. And this for the quarter, January quarter, of that year, is it not? Look at it yourself and see.

A. Yes, this is for the month of January, 1933.

Q. If you will notice there, it is a return of tax \$27.54 for February, 1933. Are you positive that as far back as January, 1933, your firm was paying this tax to the Government and not passing it on to any of your customers?

A. Prior to the time involved in this suit, we did pass some tax on to our customers but we are not applying for refund to any tax paid during that time. During the time covered by the suit, we did not pass any tax to our customers.

Miss Phillips: I think I should have showed these to counsel. These are excise tax returns going back to January, 1933.

Mr. Breslauer: We have copies.

Q. Now, your suit for refund is a suit from February, 1933 to August, 1935? When is the period, in which you say, you passed the tax on to some of your customers?

A. Prior to that time.

Q. How long prior?

A. I would have to look at the records. It might be immediately prior, I don't recall off hand, but I know it was prior to the time involved in this suit.

Q. Do you know how long a period you passed the tax on to your customers?

(Testimony of Nelson N. Scotchler.)

A. From the time—I don't know the dates—but I can refer to it in this way. It was from the start of the time that a manufacturers tax was levied; when that law went into effect.

Q. Tell me, how did you pass it on? Did you put it on your bill?

A. We showed it as such.

Q. Have you ever—let me ask you, if you dropt this manufacturer's tax? You first stated it on your bill; then you dropt it on your bill, wasn't that because you incorporated it in the price you [62] charged your customers? A. No.

Q. How do you know then?

A. Because, I know that, at the time somewhat following this period, covered by this, it was considered in the cost of various materials, such as babbitt etc. It became necessary for us to increase the price of connecting rods and as many of our competitors had dropt passing of this tax on to their customers, we had to do the same thing.

Q. Well, now, when you pass a price on to a customer you didn't have to state it on your bill, did you—for instance, the government buys goods some of which have been imported, let us say from British Columbia, that tax isn't stated on the bill to the United States Government?

A. That may be so.

Q. Well, now the same way with you, you don't have to state it on your bill?

(Testimony of Nelson N. Scotchler.)

Mr. Breslauer: That is rather argumentative. The prices of these rods, these rods are competitive ones, fixed by the trade in the district where he operates, and that is the reason he gave that the tax wasn't put on. He has testified that the tax was included on the face of the price, up until the time materials were increased in price, and other manufacturers dropt it.

Witness: To the best of my knowledge and recollection that is the case.

Miss Phillips: That is all.

NORMAN MACAULEY,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Breslauer:

Q. Mr. Macauley, what is your capacity with the plaintiff?

A. I would be the superintendent or foreman.

Q. Will you explain to the court just the circulation of the various rods in the shop?

A. Well, in reference to the number of rods we [63] have on hand, I would say, each, perhaps not the same rod, in comparison to the stock, would be ten or twelve times in a year. In other words, if we had four or five thousand rods in stock, we

(Testimony of Norman Macauley.)

would probably circulate them to the extent of sixty thousand rods in a year. Some rods would be rebabbitted over the same period of time. It would all depend on how much service that motor may have had.

Q. In other words, these particular rods that are worked up in your shop, come in as a matter of exchange? A. That is right.

Q. In other words, the jobber is supplied with a rebabbitted rod and he sends back, one that is worn, and then he is credited with the one he has sent back?

A. Also, in many instances, if the rods come in are of a rare, foreign nature, we have to rebabbitt the same one and return it to him, so that he can carry it in his stock for future exchange.

Mr. Breslauer: That is all.

Cross Examination

By Miss Phillips.

Q. Mr. Macauley, how long have you been with the Moroloy Bearing Service Company?

A. More than thirteen years.

Q. And before that, what was your employment?

A. School.

Q. You have never worked in an automobile factory? A. No.

Q. What would you say was the percentage of bearings that come in from jobbers, to you, to whom you are supplying Moroloy Bearings?

(Testimony of Norman Macauley.)

A. I don't understand that question.

Q. My question isn't clear? Some of the old forgings you get from the purchasers of stuff from wrecking concerns—Now some you get from jobbers. How many—can you tell me what is the proportion between the two of forgings that come in from junk people or people that buy from wreckers? You referred to that as circulation, didn't you?

A. Well, if we are carrying four or five thousand rods in stock, [64] the circulation of those rods is probably ten or twelve times a year or roughly around sixty thousand rods exchanged.

Q. You mean the rods come back?

A. Back and forth to our customers.

Q. The same forgings might come back to you five or six times a year?

A. Not five or six times, but the same forgings—it is entirely possible, it would come back two or three times in a year, although not necessarily.

Q. You do not keep any record of it, the proportion of forgings, which you inspect and examine and then melt and run through the process and re-alloy—how many of those come from purchasers of junk?

A. I would say no more than two or three per cent because the sale of the forging itself is practically negligible. It is an exchange proposition.

Q. Do you, when a jobber sends in a worn rod to you, credit that on the bill of something you have already supplied him?

(Testimony of Norman Macauley.)

A. We supply him from the stock of rods that we have with the rod of the same brand or same stock number.

Q. I don't understand how you credit him.

A. If the customers sends in a hundred rods, we examine the rods and identify them as to which motor they fit. Then we rebabbitt them or ship him identical rods from our stock and his rods are put through the process and rebabbitted and are stocked.

Q. How do you charge him for that?

A. He is charged only for rebabbitting.

Q. There is no charge made for the forging itself that he sends?

A. If he sends an old rod in and we supply him with a rebabbitted rod, there is no charge.

Q. Suppose he sends in some rods that are bent?

A. Then a temporary charge is made on the forging and then the customer in most [65] instances can get rods from the same source that we get them. He returns them to us and he is credited with whatever amount has been charged to him.

Miss Phillips: That is all.

Mr. Breslauer: That is the Plaintiff's Case.

Miss Phillips: I have no evidence to submit, your Honor.

The Court: I would like both attorneys to submit authorities.

(Thereafter the case was submitted on briefs to be filed in 15, 15 and 5 days, and then the matter to stand submitted.)

[Endorsed]: Filed July 16, 1940. Walter B. Mal-
ing, Clerk. [66]

[Endorsed]: No. 9786. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Moroloy Bearing Service of Oakland, Ltd., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 1, 1941.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9786

UNITED STATES OF AMERICA,

Appellant,

vs.

MOROLOY BEARING SERVICE OF OAK-
LAND, LTD., a corporation,

Appellee.

STATEMENT OF POINTS RELIED ON BY
APPELLANT ON APPEAL

Comes now the United States of America, the Appellant herein, appearing by its Attorneys, and pursuant to the Rules of this Court, files the following statement of the points upon which the Appellant will rely upon appeal:

I.

The District Court erred in determining that the sales of connecting rods by the Appellee during the taxable period involved herein, were not sales of automobile parts by a manufacturer or producer thereof within the purview of Section 606 (c) of the Revenue Act of 1932.

II.

The District Court erred in determining that Appellee was a repairer of the connecting rods during the taxable period involved herein, and that Ap-

pellee was not a manufacturer or producer of such connecting rods, within the purview of Section 606 (c) of the Revenue Act of 1932.

III.

The District Court erred in finding that the Appellee did not manufacture or produce the connecting rods during the taxable period involved herein, upon which the taxes were paid, and which were sought to be refunded herein.

SAMUEL O. CLARK

Assistant Attorney General

FRANK J. HENNESSY

United States Attorney,

By ESTHER B. PHILLIPS

Assistant United States Attorney.

[Endorsed]: Filed Apr. 1, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED IN THE RECORD ON APPEAL

To the Clerk of the Circuit Court of Appeals for
the Ninth Circuit:

The Appellant above-named, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment

entered herein by the District Court of the United States for the Northern District of California, Southern Division, hereby designates the entire record docketed as the record on appeal for printing in the record on appeal in conformance with the Rules of the Circuit Court of Appeals for the Ninth Circuit.

FRANK J. HENNESSY

United States Attorney,

By ESTHER B. PHILLIPS

Assistant United States At-
torney.

[Endorsed]: Filed Apr. 1, 1941. Paul P. O'Brien,
Clerk.

